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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
Los Angeles Division**

Z.B., a minor, and J.B., a minor, by
their guardian, S.S., and S.S., an
individual,

Plaintiffs,

v.

DELTA AIR LINES, INC.;
BRIAN PARTRICK DURNING; and
DOES 1-5, inclusive,

Defendants.

Case No. 2:24-cv-06190 FLA (DFM)
Hon. Fernando L. Aenlle-Rocha
Courtroom 6B

**DELTA AIR LINES, INC.'S,
RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION TO
REMAND ACTION TO STATE
COURT**

Complaint Filed: January 30, 2024

Hearing Date: September 6, 2024
Time: 1:00pm
Courtroom: 6B

Trial Date: Not yet set

Defendant Delta Air Lines, Inc. ("Defendant" or "Delta"), by and through
its attorneys, Wilson, Elser, Moskowitz, Edelman, & Dicker LLP, hereby opposes
Plaintiffs Z.B., J.B., and S.S.' ("Plaintiffs") Motion to Remand Action to State
Court ("Motion to Remand") (Dkt. No. 14) as follows:

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Delta properly removed this action based on new information that definitively establishes the amount in controversy exceeds the required threshold. This Court has original jurisdiction pursuant to 28 U.S.C. § 1332 because the plaintiffs and the defendants are citizens of separate states and the amount in controversy has been confirmed through written discovery to be in excess of \$75,000. Plaintiffs are California citizens. Delta, a corporation, is a citizen of Delaware and Georgia. Defendant Brian Patrick Durning (“Defendant Durning” or “Durning”) is a citizen of Florida. Defendant Durning consented to the removal, and the removal was timely filed within 30 days of service of Plaintiffs’ discovery responses.

In the instant Motion to Remand, Plaintiffs do not contest that the amount in controversy exceeds the \$75,000.00 threshold. Instead, Plaintiffs base their motion on the assertion that Defendant Durning is domiciled in California and the parties are therefore not diverse. Plaintiffs also argue, without merit, that their discovery responses do not provide a basis for a second removal and vaguely contest whether Defendant Durning actually consented to the removal.

Diversity jurisdiction exists because Defendant Durning is domiciled in Florida, as of the time Plaintiffs filed their complaint on January 30, 2024. Durning’s physical presence in Florida, coupled with his expressed intention to return there and his substantive connections to the state, conclusively establish that he is a Florida citizen.

For purposes of diversity, domicile is determined as of the time the lawsuit is filed. Furthermore, domicile is not equivalent to residence. Rather a person’s domicile is their “permanent home,” the place they intend to remain permanently or to which they intend to return. Plaintiffs’ argument regarding Durning’s domicile is premised solely on the fact that Durning resided in California and had

connections with that state *at the time of his arrest*. However, this evidence is irrelevant and unpersuasive, as the arrest occurred more than one year before the Complaint was filed. Plaintiffs produce no evidence that Durning has *any* intent to return to California after his release from prison or to reside there permanently. In contrast, Durning has repeatedly expressed his intent to return to Florida. This stated intention is corroborated, and supported, by Durning’s extensive existing connections to the State of Florida.

In sum, diversity jurisdiction exists in this matter and Delta’s removal is proper. Defendant Durning, who is a citizen of the state of Florida, consented to the removal. Plaintiffs’ discovery responses constitute “other papers” that provided grounds for removal. Delta complied with all substantive and procedural requirements for removal and has met its burden of proof in establishing both the amount in controversy and the citizenship of the parties. Accordingly, Plaintiffs’ motion to remand must be denied.

II. PROCEDURAL HISTORY

Plaintiffs Z.B., a minor, and J.B., a minor, by their guardian, S.S., and S.S., an individual, filed a Complaint against Delta Air Lines, Inc., Brian Patrick Durning, and Does 1-5 on January 30, 2024, in the Superior Court of Los Angeles County, case number 24TRCV00333 (the “State Court Action”).

Plaintiffs’ Complaint arises out of an incident on board a Delta flight from Los Angeles, California to Orlando, Florida. According to the complaint, Defendant Durning assaulted, Z.B., a minor passenger sitting next to him, causing injury to Z.B., her sibling J.B., and her mother, S.S. Durning was arrested and subsequently convicted of assaulting a minor and two counts of simple assault by a federal jury in the United States District Court for the Middle District of Florida.

On March 18, 2024, Delta timely filed a Notice of Removal, hereinafter referred to as the “First Notice of Removal”. *See* Z.B. a minor et al. v. Delta Air Lines, Inc. et al., Case No. 2:24-cv-02178 FLA (“Prior Action”) at Dkt. No. 1,

1 Notice of Removal. In the First Notice of Removal, Delta alleged that complete
2 diversity existed between the parties and the amount in controversy exceeded the
3 jurisdictional requirement of \$75,000.00 as required by 28 U.S.C. § 1332.

4 On March 26, 2024, the Court issued an Order to Show Cause Why Action
5 Should Not Be Remanded for Lack of Subject Matter Jurisdiction. *See* Prior Action
6 at Dkt. No. 23. The Court ordered the parties to show cause why the action should
7 not be remanded for lack of subject matter jurisdiction because the amount in
8 controversy did not appear on the face of the Complaint to exceed \$75,000.

9 On March 27, 2024, Delta conferred with Plaintiffs' counsel to inquire as to
10 the amount of controversy that Plaintiffs are seeking in this matter by requesting
11 Plaintiffs stipulate that the amount in controversy (1) does not exceed \$75,000.00
12 or (2) does exceed \$75,000.00. Plaintiffs declined to enter such a stipulation or to
13 disclose the amount they were truthfully seeking. *See* Dkt. No. 1-3, Email from
14 Plaintiffs' Counsel. Plaintiffs also declined to provide any substantive information
15 to Delta regarding their claimed injuries or damages.

16 On April 15, 2024, the Court issued its Order Remanding Action for Lack
17 Of Subject Matter Jurisdiction. *See* Prior Action at Dkt. No. 37. In the Order, the
18 Court found that Delta had not met its burden of submitting sufficient evidence
19 which proved the amount in controversy exceeded \$75,000.00.

20 Following remand, Delta served initial discovery on Plaintiffs seeking
21 information relating to their alleged damages. On June 24, 2024, Plaintiff Z.B.
22 responded to Delta's First Set of Requests for Admissions and admitted they are
23 each seeking far more than \$75,000.00 in damages. *See* Dkt. No. 1-4, Plaintiffs'
24 Responses to Requests for Admissions.

25 On June 24, 2024, Plaintiffs served responses to Delta's Request for
26 Statement of Damages, providing additional information regarding their claimed
27 damages. *See* Grace Decl. at ¶ 3, **Exhibit A**. Plaintiff Z.B. stated that she is seeking
28 \$41,800,000.00 in damages. *Id.* Plaintiff S.S. stated that she is seeking

1 \$21,350,000.00 in damages. *Id.* Plaintiff J.B. stated that he is seeking
 2 \$20,800,000.00 in damages. *Id.*

3 Based on this new information, Delta filed a second Notice of Removal to
 4 remove this matter to this Court pursuant to 28 U.S.C. § § 1332, 1441, and 1446
 5 asserting that this Court had diversity jurisdiction based on 28 U.S.C. § 1332 hereto
 6 referred to as “Second Notice of Removal.” *See* Dkt. No. 1.

7 **III. STATEMENT OF RELVANT FACTS**

8 Pursuant to the Complaint, Plaintiffs are permanently domiciled in Los
 9 Angeles, California. *See* Plaintiffs’ Complaint, Dkt. No. 1-1 at ¶ ¶ 7-9. It is
 10 undisputed that Delta is a citizen of both Delaware and Georgia. *Id.* at ¶ 10.

11 Defendant Durning is domiciled in and a citizen of the State of Florida. The
 12 evidence demonstrating Defendant Durning’s Florida citizenship is extensive. It is
 13 undisputed that Defendant Durning does not presently reside in California. He is
 14 currently incarcerated at FCI Fort Dix in New Jersey. *See* Dkt. No. 14-1 at ¶ 6; *see*
 15 *also* Grace Decl. at ¶ 17, **Exhibit N** at ¶ 11. Durning has not been physically
 16 present in the State of California since prior to his criminal trial in June 2023. *See*
 17 Grace Decl. at ¶ 5, **Exhibit B** at p. 229:4-9, 230:2-4. Durning has no existing
 18 substantive ties to the State of California and does not intend to return to California
 19 following his release from prison. *See* Grace Decl. at ¶ 6, **Exhibit C**; **Exhibit N** at
 20 ¶ 11. Rather, Defendant Durning intends to return to his home in Florida after his
 21 release from federal custody. *Id.*

22 Defendant Durning grew up in Florida and attended college there. After
 23 college, he was a “rolling stone,” trying out different careers and living in various
 24 states other than Florida, including New York and California. *See* Grace Decl. at ¶
 25 7, **Exhibit D** at 33:16-17 and 54:8-18; *id.* at ¶ 8, **Exhibit E** at p. 11; *see also* Dkt.
 26 No. 14-11, LinkedIn Profile, attached to Plaintiffs’ Motion as Exhibit 10. The
 27 government’s expert witness described Durning as follows:
 28

Over the course of his life, Mr. Durning has floundered professionally and personally and not achieved the landmarks that signal stability and maturity. His multiple career changes have not led to steady, gainful employment. He has shifted from relationship to relationship. He has lived with his parents on and off for many years and when married, was supported financially by his wife.

See Grace Decl. at ¶ 8, **Exhibit E** at p. 11.

Durning's family, including his mother and father, live in Florida. *See* Grace Decl. at ¶ 5, **Exhibit B** at p. 229:4-9; *id.* at ¶ 7, **Exhibit D** at p. 24:9-25:9 and 26:4-27:6; *id.* at ¶ 9, **Exhibit F**. At the time of the incident, Durning was married to Marian Fernandes Durning. *See* Grace Decl. at ¶ 10, **Exhibit G**; *see also* Dkt. No. 14-12, Family Law Financial Affidavit, attached to Plaintiffs' Motion as Exhibit 11. Durning's ex-wife lives in Florida. *See* Grace Decl. at ¶ 11, **Exhibit H** at p. 4; *id.* at ¶ 12, **Exhibit I**. They remain close and she supported him by attending the trial and submitting a letter to the Court on his behalf. *Id.* Durning's close friend, David Hammett, who testified on his behalf at his sentencing hearing, lives in Florida. *See* Grace Decl. at ¶ 7, **Exhibit D** at p. 32:9-35:10.

Durning used a Florida address when booking the June 23, 2022, flight that gave rise to this incident. *See* Grace Decl. at ¶ 13, **Exhibit J**. Durning provided police with a Florida address at the time of the incident and this Florida address was listed in the police report. *See* Grace Decl. at ¶ 14, **Exhibit K**; *id.* at ¶ 9, **Exhibit F**. Durning's phone number has a Florida area code. *See* Grace Decl. at ¶ 14, **Exhibit K**. Durning's divorce from Marian Fernandes Durning, which was filed in October 2022 (a few months after the incident), proceeded in Lee County, Florida. *See* Grace Decl. at ¶ 10, **Exhibit G**. In August 2022 (shortly after the incident), Durning executed a Family Law Financial Affidavit reflecting he was self-employed with no income, no assets, and no personal or real property, and had only \$100 to his name. *See* Dkt. No. 14-12, Family Law Financial Affidavit, attached to Plaintiffs' Motion as Exhibit 11.

1 Defendant Durning does not have an active California real estate license as
2 it was lost due to his arrest and subsequent conviction. *See* Grace Decl. at ¶ 6,
3 **Exhibit C**; *see also* Dkt. No. 14-15, License Information from the State of
4 California’s Department of Real Estate, attached to Plaintiffs’ Motion as Exhibit
5 1. Durning is not currently married and has no children. Durning does not own any
6 property in California, maintain a residence in California, or currently have any
7 employment in California. Defendant Durning does not own any assets or maintain
8 any assets in California. *See* Dkt. No. 14-12, Family Law Financial Affidavit,
9 attached to Plaintiffs’ Motion as Exhibit 11.

10 Prior to and during his criminal trial, Defendant Durning stayed with his
11 family in Florida. *See* Grace Decl. at ¶ 5, **Exhibit B** at p. 229:4-9. After his
12 conviction on June 22, 2023, Durning’s pretrial release was revoked and he was
13 remanded into custody and incarcerated in Orange County, Florida where he
14 resided until his sentencing hearing on September 26, 2023. *See* Grace Decl. at ¶
15 5, **Exhibit B** at p. 230:2-4; *id.* at ¶ 7, **Exhibit D** at p. 43:6-7. Upon his conviction,
16 Durning intended and still intends to live in the Middle District of Florida where
17 his mother lives. *See* Grace Decl. at ¶ 17, **Exhibit N** at ¶ 11.

18 At his sentencing hearing, and several months before the filing of the
19 Complaint, Defendant Durning’s mother repeatedly asked that Durning be allowed
20 to come “home” to help her and his father while his father recovered from a surgery
21 scheduled for September 2023. *See* Grace Decl. at ¶ 7, **Exhibit D** at p. 24:9-25:9
22 and 26:4-27:6. Notably, Durning’s attorney requested that he be incarcerated in the
23 closest facility to Orlando, Florida. *Id.* at p. 82:25-83:6.

24 “Your Honor, we’d request a recommendation for a facility closest to
25 Orlando. I think if we ask for a specific facility and then they’re not
26 able to send him there, then they open it up to the entire country; but
27 if the Court recommends a facility closest to Orlando, then if one isn’t
28 available, they’ll send him to the next closest one.”

1 *Id.* The Court granted this request, recommending that Durning be incarcerated in
 2 a facility closest to Orlando or, if unavailable, a facility in Florida. *Id.* at p. 83:7-
 3 12; *see also* See Grace Decl. at ¶ 15, **Exhibit L**.

4 Durning has repeatedly confirmed his intent to return to Florida upon his
 5 release from prison. *See* Grace Decl. at ¶ 6, **Exhibit C**; *id.* at ¶ 16, **Exhibit M**; *id.*
 6 at ¶ 17, **Exhibit N** at ¶ 11.

7 **IV. LEGAL STANDARD**

8 A civil action may be removed to the district court where the action is
 9 pending if the district court has original jurisdiction over the action. 28 U.S.C.
 10 1441(a). A district court has jurisdiction of a civil action where the matter in
 11 controversy exceeds the sum or value of \$75,000.00, exclusive of interest and
 12 costs, and the dispute is between “citizens of different states.” 28 U.S.C. § 1332.
 13 Such diversity jurisdiction requires complete diversity, i.e., that “the citizenship of
 14 each plaintiff is diverse from the citizenship of each defendant.” *Caterpillar Inc.*
 15 *v. Lewis*, 519 U.S. 61, 67-68 (1996).

16 The defendant removing the case to federal court bears the burden of
 17 establishing jurisdictional facts, namely the complete diversity of the parties and
 18 the amount in controversy. *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676,
 19 682-83 (9th Cir. 2006). Where a plaintiff contests a jurisdictional fact, the
 20 defendant must establish that fact by a preponderance of the evidence. *Gaus v.*
 21 *Miles, Inc.*, 980 F.2d 564, 566-67 (9th Cir. 1992) (quoting *McNutt v. General*
 22 *Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135
 23 (1936)).

24 **V. ARGUMENT**

25 This action was properly removed because the parties are completely diverse
 26 and the newly uncovered information from Plaintiffs’ discovery responses clearly
 27 demonstrates that that the amount in controversy exceeds the federal threshold
 28 under 28 U.S.C. § 1332. A preponderance of evidence supports that Brian Durning

1 is domiciled in and a citizen of the state of Florida. Durning consented to the
2 removal, which was timely filed after receipt of Plaintiffs' discovery responses.

3 **A. The preponderance of evidence establishes that Defendant Durning is**
4 **a Florida citizen and, therefore, complete diversity exists between the**
5 **parties.**

6 A person is domiciled where he or she "(1) has established a fixed habitation
7 or abode in a particular place, and (2) intends to remain . . . permanently or
8 indefinitely." *Lew v. Moss*, 797 F.2d 747, 750 (9th Cir. 1986) (quotations omitted).
9 "[A] person's old domicile is not lost until a new one is acquired," and "[a] change
10 in domicile requires the confluence of (a) physical presence in the new location
11 with (b) an intention to remain there indefinitely." *Id.* at 750. The existence of
12 domicile for purposes of diversity is determined as of the time the lawsuit is filed.
13 *Id.* Thus, a person is a citizen of the state in which he is domiciled at the time the
14 lawsuit is filed. *Id.* at 749-50.

15 Critically, "[a] person residing in a given state is not necessarily domiciled
16 there, and thus is not necessarily a citizen of that state." *Kanter v. Warner-Lambert*
17 *Co.* 265 F.3d 853, 857 (9th Cir. 2001). This is because "28 U.S.C. §1332 speaks
18 of citizenship, not of residency. . . . The natural person's state citizenship is then
19 determined by her state of domicile, not her state of residence." *Id.*; *see also*
20 *Ehrman v. Cox Communs., Inc.*, 932 F.3d 1223 (9th Cir. 2019) ("We agree that
21 residency is not equivalent to citizenship."); *Weible v. United States*, 244 F.2d 158,
22 163 (9th Cir. 1957) ("Residence is physical, whereas domicile is generally a
23 compound of physical presence plus an intention to make a certain place one's
24 permanent abode, though, to be sure domicile often hangs on the slender thread of
25 intent alone, as for instance where one is a wanderer over the earth. Residence is
26 not an immutable condition of domicile."). Rather, a person's domicile is his or
27 her "permanent home, where she resides with the intent to remain or to which she
28 intends to return." *Kanter*, 265 F.3d at 857.

1 Courts consider a number of factors in determining an individual's
2 citizenship including: "current residence, voting registration and voting practice,
3 location of personal and real property, location of brokerage or bank accounts,
4 location of spouse and family, membership in unions and other organizations, place
5 of employment or business, driver's license and automobile registration, and
6 payment of taxes." *Lew*, 797 F.2d at 750. However, no single factor is controlling.
7 *Id.*

8 It is true that "[i]n cases involving prisoners, the courts presume that the
9 prisoner remains a citizen of the state where he was domiciled before his
10 incarceration, even if he is subsequently incarcerated in a different state." *Hall v.*
11 *Curran*, 599 F.3d 70, 72 (1st Cir. 2010). "Because domicile is a voluntary status a
12 prisoner is presumed to be a citizen of the state in which he was a citizen before
13 his incarceration, even if he is subsequently incarcerated in another state." *Smith*
14 *v. Cummings*, 445 F.3d 1254 (10th Cir. 2006); *Sullivan v. Freeman*, 944 F.2d 334
15 (7th Cir. 1991). However, that presumption is rebuttable. *Stifel v. Hopkins*, 477
16 F.2d 1116 (6th Cir. 1973). "A litigant will not be precluded from establishing a
17 domicile within a state for purposes of diversity jurisdiction solely because his
18 presence there initially resulted from circumstances beyond his control." *Id.* When
19 determining the citizenship of a prisoner, relevant factors for the district court to
20 consider include "the prisoner's declaration of intentions, the possibility of parole,
21 the manner in which [he] has ordered his personal and business affairs, and any
22 other factors..." *Smith*, 445 F.3d at 1260.

23 Here, the determination of domicile for diversity purposes is not based on
24 where Durning was domiciled at the time of the incident or at the time of his arrest,
25 but, rather, where he was domiciled at the time the Complaint was filed in January
26 2024. The evidence demonstrates that, at least as of the time of the filing of the
27 Complaint to present, Durning's domicile is the state of Florida. This is supported
28 by several key factors demonstrating Durning's substantive and extensive

1 connections to the state of Florida including: his physical presence in Florida prior
2 to and after incarceration; his living in Florida with his family leading up to and
3 during his criminal trial; his request to remain in Florida and be sentenced to a
4 prison in Florida; the location of his family and friends in Florida; his lack of assets
5 and employment; his history as a “rolling stone” who bounced around the country;
6 his post-arrest divorce proceedings in Florida; his use of a Florida address for travel
7 purposes and during his interaction with law enforcement; his maintenance of a
8 Florida telephone number; the absence of any personal or real property in
9 California; the absence of any current residence in California; the absence of any
10 employment or business in California; the absence of any intent to return to
11 California; and, most importantly, Durning’s intent to reside in Florida after his
12 release from prison.

13 Durning was a “rolling stone” and he lived off and on with his parents and
14 ex-wife in Florida throughout his life. *Id.* Defendant Durning’s mother has lived in
15 the same home in Longwood, Florida since he was five (5) years old and testified
16 she has no plans to relocate. *See* Grace Decl. at ¶ 7, **Exhibit D** at p. 27:1-6.
17 Durning’s mother asked the court to send him “*home*” (*i.e. to their residence in*
18 *Florida*) *eleven (11) times* at his sentencing hearing. *Id.* at p. 24:9-27:6. Tellingly,
19 neither of the friends who testified at Durning’s sentencing hearing were
20 individuals he met while in California, instead, both relationships were rooted in
21 his ties to Florida. *Id.* at p. 27:15-18 and 35:10-12.

22 Durning has been in federal custody since June 22, 2023 and has not been
23 physically present in California since before that time. Plaintiff’s Motion to
24 Remand concedes that the Ninth Circuit has not established a presumption that
25 prisoners are domiciled in the state where they resided in before their incarceration.
26 *See* Dkt. No. 14, Plaintiffs’ Motion at p. 11. Therefore, the issue of domicile should
27 be determined by his physical presence in Florida coupled with a stated intent to
28 remain there indefinitely.

1 Upon his conviction in Florida in June 2023, Durning intended and still
2 intends to live in the Middle District of Florida where his mother lives. *See* Grace
3 Decl. at ¶ 17, **Exhibit N** at ¶ 11. Defendant Durning, through his criminal attorney,
4 expressed his desire and intention to remain in Florida at his sentencing hearing in
5 September 2023. Durning was staying at his family home in Florida prior to and
6 during his trial and was jailed in Orange County, Florida, for the three-month
7 period between his criminal conviction in June 2023 and sentencing hearing in
8 September 2023. At his sentencing, Durning requested to be incarcerated in the
9 facility closest to Orlando, demonstrating his desire to remain in Florida. Notably,
10 he did not request to be incarcerated at a facility in California. Defendant During
11 formed and expressed an intent to remain in Florida, near his family, permanently
12 while physically present and residing in the state. Since June 2023, Durning has
13 consistently maintained his intent to return to Florida upon his release and
14 confirmed his existing lack of connections to California. *See* Grace Decl. at ¶ 6,
15 **Exhibit C**; *id.* at ¶ 16, **Exhibit M**; *id.* at **Exhibit N** at ¶ 11.

16 Durning's stated intentions are not amorphous or fleeting, but are based on
17 his extensive existing ties to the State of Florida and the location of his support
18 system. There is no indication Durning has been physically present in California
19 at any time since his trial in June 2023 and there is no indication that Durning has
20 any intent to return to California. Durning has continued to express an intent to live
21 in Florida as recently as the time of removal. Therefore, the preponderance of
22 evidence clearly establishes that Defendant Durning was domiciled in Florida
23 when the action was initiated on January 30, 2024 and at the time of removal.

24 In contrast, Plaintiffs can only point to Durning's stale connections to
25 California from before his trial and conviction. Even if California would have been
26 considered Durning's domicile at the time of the subject incident (and Delta does
27 not so concede given Durning's history as a wanderer and the evidence outlined
28 above), Plaintiffs reference no Ninth Circuit case law or statute articulating that

1 involuntary incarceration prevents an individual from changing his domicile and
2 acquiring a new one. More importantly, Plaintiffs cannot point to any evidence
3 demonstrating that Durning intends to return to California after his release from
4 prison. It is undisputed that Durning was physically present in Florida with an
5 intention to remain there at the time of his incarceration and well before the
6 initiation of this action. Thus, even if Durning had acquired the domicile of
7 California when he resided there prior to his arrest, he re-acquired the domicile of
8 Florida prior to the initiation of this action. California simply cannot by any
9 measure of the evidence be said to be Durning’s “permanent home”, the place he
10 intends to return to, or the place he intends to remain “permanently.”

11 Plaintiffs’ reliance on case law wherein courts concluded that a prisoner’s
12 domicile did not automatically change when they were involuntarily moved to a
13 different state is misplaced. Delta does not argue that Durning is a citizen of New
14 Jersey, the location where he happens to be currently incarcerated. Rather, Delta
15 asserts that Durning is a citizen of Florida, the state where he grew up, where his
16 family lives, and where he intends to reside after incarceration. The cases cited by
17 Plaintiffs therefore actually support a determination that Durning is domiciled in
18 Florida.

19 For example, in *Johnson v. Johnson*, the Ninth Circuit concluded that a
20 prisoner was domiciled in Oregon because he had been a resident of Oregon at the
21 time of his incarceration, and he *had not expressed* an intent or taken any actions
22 to demonstrate an intent to establish a domicile anywhere outside of Oregon.
23 *Johnson v. Johnson*, 615 Fed. Appx. 430, 431 (9th Cir. 2015). Here, Durning was
24 physically present in Florida, expressed the intent to return there after his
25 incarceration, and took multiple actions demonstrating an intent to return to Florida
26 – factors the *Johnson* court found compelling.

27 Plaintiffs face a similar problem in *Buenrostro v. Buenrostro*, in which the
28 court determined that an individual incarcerated in Louisiana remained a citizen of

1 California. *Buenrostro v. Buenrostro*, No. 2:15-cv-138-JAM-KJN, 2015 U.S. Dist.
 2 LEXIS 52403, at *9 (E.D. Cal Apr. 12, 2015), report and recommendation adopted,
 3 No. 2:15-cv-138-JAM-KJN, 2015 U.S. Dist. LEXIS 182778 (E.D. Cal. June 8,
 4 2015). The Court found the plaintiff had failed to provide the court with “any
 5 objective facts or other evidence” indicating he had changed his domicile from
 6 California, where he resided prior to incarceration, to Louisiana, where he was
 7 incarcerated. *Id.* Importantly, in that case the court noted “Plaintiff points to no
 8 specific family or property ties to Louisiana. He does not even allege that he
 9 intends to make Louisiana his permanent home should he ever be released from
 10 custody.” *Id.* It was undisputed in *Buenrostro* that the plaintiff’s family (including
 11 his brothers, former wife and children) still resided in California, the real property
 12 at issue was in California, and the prisoner had requested to be transferred to a
 13 prison in California to be located near his family. *Id.* at *10-12. The Court found
 14 that the plaintiff’s actions indicated an intent to return to California after
 15 incarceration. *Id.* at *12. These facts are entirely distinct from the matter at hand,
 16 where Durning requested to be incarcerated in Florida, has stated an intention to
 17 return to Florida after his release, and his mother and father reside in Florida.
 18 Again, this reasoning supports a finding that Durning is a citizen of Florida.

19 The preponderance of the evidence establishes that Durning was a citizen of
 20 Florida at the time the Complaint was filed, as he intends to return there after his
 21 incarceration to be with his family. Plaintiffs attempt to fit a square peg into a round
 22 hole by citing cases related to prisoners lacking any independent connection to the
 23 location of their incarceration or attempting to assert domicile in a location where
 24 they have no existing connections.

25 Diversity jurisdiction exists and this matter was properly removed to federal
 26 court pursuant to 28 U.S.C. §1332, 28 U.S.C. § 1441, and 28 U.S.C. §1446.
 27 Accordingly, the Court should deny Plaintiffs’ Motion to Remand, as the parties
 28 are completely diverse.

1 **C. Delta appropriately filed a second notice of removal based upon**
 2 **Plaintiffs’ discovery responses, which constitute “other papers” within**
 3 **the meaning of 28 U.S.C. § 1446(b) and which conclusively establish**
 4 **the amount in controversy exceeds the threshold.**

5 Delta’s second removal was proper because Plaintiffs’ responses to Delta’s
 6 written discovery provided previously unavailable information that constituted
 7 new and different grounds for removal.

8 The Ninth Circuit has held that a successive removal petition is permitted
 9 “upon a relevant change in circumstances . . . when subsequent pleadings or events
 10 reveal a *new and different* ground for removal.” *Reyes v. Dollar Tree Stores, Inc.*,
 11 781 F.3d. 1185, 1188 (9th Cir. 2015). “Where a court has previously remanded a
 12 removed action for a defendant's failure to meet its burden, successive notices of
 13 removal . . . generally must be based on information not available at the prior
 14 removal.” *Sweet v. United Parcel Serv., Inc.*, No. 19-CV-02653, 2009 U.S. Dist.
 15 LEXIS 54909, at *3 (C.D. Cal. June 15, 2009).

16 Parties are permitted to file a second removal when newly discovered
 17 information obtained through written discovery offers new and different grounds
 18 for removal. *See Aguilar v. Roto-Rooter Servs. Co.*, No. CV23-4537PA (SKx),
 19 2023 U.S. Dist. LEXIS 130196, at *7 (C.D. Cal. July 26, 2023) (“Sworn discovery
 20 responses received from another party in the pending litigation constitute ‘other
 21 paper’ within the meaning of 28 U.S.C. § 1446(b) from which a party may properly
 22 be put on notice that a case is or has become removable”; denying motion to
 23 remand a second removal that was based on discovery responses); *Carson*
 24 *Cogeneration Co. v. Scottsdale Ins. Co.*, No CV 19-10797, 2020 U.S. Dist. LEXIS
 25 28155, at *7-8 (C.D. Cal. Feb. 18, 2020). (permitting successive removal based on
 26 information newly discovered through discovery); *Cleveland v. West Ridge Acad.*,
 27 No. 1:14-cv-01825, 2015 U.S. Dist. LEXIS 3897, at *13 (E.D. Cal. Jan. 13, 2015)
 28 (“[A] plaintiff’s statement of damages furnished after service of the complaint can

1 constitute ‘other paper’ within the meaning of section 1446(b) and trigger the
 2 thirty-day period for removal.”); *see also Benson v. SI Handling Sys., Inc.*, 188.
 3 F.3d 780, 783 (7th Cir. 1999) (“The only effect of adopting an absolute one-bite
 4 rule would be to encourage plaintiffs to be coy”).

5 At the time of the initial removal, the only information available to Delta
 6 regarding Plaintiffs’ alleged damages was the allegations in the complaint.
 7 Plaintiffs’ discovery responses and Statements of Damages provided information
 8 that was not previously available to Delta and conclusively established the amount
 9 in controversy exceeded the minimum threshold. Delta’s second removal, based
 10 on this new and different information, is therefore proper and appropriate.

11 In *Cleveland v. West Ridge Acad.*, No. 1:14-cv-01825, 2015 U.S. Dist.
 12 LEXIS 3897, at *13 (E.D. Cal. Jan. 13, 2015), when the defendant first attempted
 13 to remove the case on diversity grounds, the matter was remanded for lack of
 14 subject matter jurisdiction because the complaint failed to plead a specific amount
 15 of damages establishing the amount in controversy met the statutory minimum and
 16 a demand letter sent prior to the service of the complaint was not sufficient
 17 evidence to establish removability. *Id.* at *4-5. After remand, the plaintiffs served
 18 Statements of Damages on Defendants, seeking damages totaling \$400,000, and
 19 the defendant filed a second notice of removal. The district court denied plaintiffs’
 20 motion to remand, concluding the Statements of Damages constituted an “other
 21 paper” within the meaning of section 1446(b), and established that the amount in
 22 controversy exceeded the jurisdictional minimum. *Id.* at *13. This is precisely what
 23 happened in this case and the reasoning in *Cleveland* should be applied here.

24 Similarly, in *Sibilia v. Mikita Corp*, 782 F. Supp. 2d 1329, 1331 (M.D. Fla.
 25 2010), the district court permitted a second removal under very similar
 26 circumstances as those presented here. In *Sibilia*, the court remanded the case after
 27 determining the defendant had failed to meet its burden in establishing the amount
 28 in controversy. *Id.* Subsequently, the defendant served the plaintiff requests for

1 admission and plaintiff was forced to admit the amount in controversy exceeded
 2 the jurisdictional threshold. *Id.* Ultimately, the district court accepted the written
 3 discovery responses as an adequate basis for a second removal. *Id.* These facts are
 4 nearly identical to those presently before the Court and the same outcome is
 5 warranted.

6 It is undisputed that Plaintiffs did not provide any information regarding
 7 their claimed damages or stipulate regarding the amount in controversy at the time
 8 of the First Removal. *See* Prior Action, Dkt. No. 34 at ¶ 12. The Ninth Circuit does
 9 not have a “one-bite” rule. Plaintiffs’ discovery responses, including their
 10 responses to requests for admissions and statements of damages constitute “other
 11 papers” within the meaning of section 1446(b), and provided Delta grounds to
 12 remove, based on the amount of controversy and the diversity of citizenship
 13 between the parties.

14 **C. Delta complied with the unanimity requirement.**

15 Defendant Durning consented to removal. *See* Grace Decl. at ¶ 6, **Exhibit**
 16 **C**; *id.* at **Exhibit N** at ¶ 11. Plaintiffs’ vague contentions challenging Durning’s
 17 consent are without merit. The Ninth Circuit does not require consent to be given
 18 in a writing or require that an affidavit stating consent be attached to a Notice of
 19 Removal. Rather, counsel’s averment as to consent in the pleading is sufficient for
 20 removal purposes. *See Proctor v. Vishay*, 584 F.3d 1208 (9th Cir. 2009) (“[W]e
 21 conclude that the filing of a notice of removal can be effective without individual
 22 consent documents on behalf of each defendant. One defendant’s timely removal
 23 notice containing an averment of the other defendants’ consent and signed by an
 24 attorney of record is sufficient.”). This majority rule is also followed by the Fourth,
 25 Sixth, and Eighth Circuits. *See Mayo v. Bd. of Educ.*, 713 F.3d 735, 742 (4th Cir.
 26 2013) (“[A] notice of removal signed and filed by an attorney for one defendant
 27 representing unambiguously that the other defendants consent to the removal
 28 satisfies the requirement of unanimous consent for purposes of removal.”); *Harper*

1 *v. AutoAlliance Intern., Inc.*, 392 F.3d 195, 201 (6th Cir. 2004) (same); *Griffioen*
2 *v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1187 (8th Cir. 2015) (same).
3 Thus, Delta satisfied the unanimous consent rule in its Notice of Removal.

4 As required by 28 U.S.C. 1446(c), Delta's counsel met and conferred with
5 Defendant Durning and obtained Durning's consent to the removal. In addition to
6 the averment in the Notice of Removal, which is sufficient for removal purposes,
7 Durning's consent is evidenced in **Exhibit C**. Accordingly, Delta complied with
8 the statutory requirement for unanimity. Durning consented to the removal.

9 This matter was properly removed and Delta's notice of removal complied
10 with all statutory requirements. Plaintiffs' Motion to Remand must be denied.

11 **VI. CONCLUSION**

12 Delta has fully satisfied its burden of showing complete diversity among the
13 parties to this case, and there is no longer any challenge or dispute as to the amount
14 in controversy. This case was properly removed in compliance with the procedural
15 and substantive requirements of 28 U.S.C. §§1332, 1441, and 1446. For these
16 reasons, and as set forth above, Delta respectfully asks this Court to deny Plaintiffs'
17 Motion to Remand, retain jurisdiction over this case, and award Delta such other
18 relief as the Court deems proper.

19 **CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 11.6-1**

20 The undersigned, counsel of record for Delta Air Lines, Inc., hereby certifies
21 that this brief contains 5,668 words, which complies with the word limit of L.R.
22 11-6.1.

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Respectfully submitted

Dated: August 16, 2024

**WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP**

By: /s/ Kathryn A. Grace
Kathryn A. Grace, Esq.
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Attorneys for Defendant
Delta Air Lines, Inc.

1 *Z.B. et al v. Delta Air Lines, Inc. et al*

2
3 **PROOF OF SERVICE**

4 I, the undersigned, am over the age of 18 and not a party to the within
5 action. My business address is 8444 Westpark Drive, Suite 510, McLean,
6 Virginia 22102.

7 On August 16, 2024, I caused to be served the following document(s)
8 described as follows:

9 **DELTA AIR LINES, INC'S. RESPONSE IN OPPOSITION TO PLAINTIFFS'**
10 **MOTION TO REMAND ACTION TO STATE COURT; DECLARATION OF**
11 **KATHRYN A. GRACE AND EXHIBITS THERETO; PROPOSED ORDER**

12 on the parties in this action by placing a true copy in a sealed envelope addressed
13 as follows:

14 **SEE ATTACHED SERVICE LIST**

15 ☐ **PERSONAL SERVICE** - I served the documents by placing them in an
16 envelope or package addressed to the persons at the addresses listed below,
17 and providing them to a professional messenger service for service. (A
18 confirmation by the messenger will be provided to our office after the
19 documents have been delivered.)

20 ☒ **BY MAIL** - As follows: to Defendant Brian Patrick Durning. I am
21 "readily familiar" with the firm's practice of collection and processing
22 correspondence for mailing. Under that practice it would be deposited
23 with the U.S. Postal Service on that same day with postage thereon fully
24 prepaid in the ordinary course of business. The envelope was sealed and
25 placed for collection and mailing on this date following our ordinary
26 practices. I am aware that on motion of the party served, service is
27 presumed invalid if postal cancellation date or postage meter date is more
28 than one day after date of deposit for mailing in affidavit.

☐ **OVERNIGHT MAIL** - As follows: I am "readily familiar" with the
firm's practice of processing correspondence for mailing overnight via
Federal Express. Under that practice it would be deposited in a Federal
Express drop box, indicating overnight delivery, with delivery fees
provided for, on that same day, at San Diego, California.

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION** - I caused the
documents to be sent to the persons at the e-mail addresses listed below. I
did not receive, within a reasonable time after the transmission, any
electronic message or other indication that the transmission was
unsuccessful.

Executed on August 16, 2024, at McLean, Virginia. I declare under
penalty of perjury under the laws of the State of California, that the above is true
and correct.

/s/ Kathryn A. Grace

Kathryn A. Grace

Z.B. et al v. Delta Air Lines, Inc. et al

SERVICE LIST

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